



California Fair Political Practices Commission

June 30, 1988

Allen E. Sprague
City Attorney
City of Fremont
39700 Civic Center Drive
P.O. Box 5006
Fremont, CA 94537

Re: Your Request for Advice
Our File No. I-88-190

Dear Mr. Sprague:

You have requested advice on behalf of Fremont City Councilmember Gary J. Mello concerning his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} This letter confirms the telephone advice I provided to you on May 4, 1988.

Your letter contains only a general question; it does not relate to a specific decision pending before the city council. Accordingly, we consider your letter to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTION

Councilmember Mello is the sole proprietor of an engineering consulting firm. If the Fremont Unified School District is a client of his firm, may Councilmember Mello participate in decisions which foreseeably and materially affect the school district?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

CONCLUSION

Councilmember Mello may participate in decisions which foreseeably and materially affect the school district, even though the school district is a client of his engineering firm. The effect on the school district will not be distinguishable from the effect on the public generally.

However, Councilmember Mello is required to disqualify himself from participating in city council decisions which would foreseeably and materially affect his engineering firm. Accordingly, he may not participate in city council decisions where there is a nexus between the decision and the work he performs for the school district. Furthermore, Councilmember Mello is required to disqualify himself from any city council decision concerning the school district which would increase or decrease the income to his firm by \$250 or more depending on the outcome of the decision.

FACTS

Councilmember Mello recently started his own engineering consulting firm. He anticipates being retained on specific jobs by various public agencies, including the Fremont Unified School District.

The boundaries of the Fremont Unified School District are coterminous with the boundaries of the City of Fremont. It is probable that a matter directly affecting the school district occasionally will be before the city council. For example, the city council currently is faced with a request from the school district to rezone surplus school property. You state in your letter that it is assumed that such decision will have a reasonably foreseeable material financial effect on the school district.

ANALYSIS

Section 87100 prohibits any public official from making, participating in or attempting to influence any governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his immediate family or on:

Allen E. Sprague
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(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more....

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Councilmember Mello is a public official. (Section 82048.) He has a business position and an investment interest in his engineering consulting firm. (Section 82034.) Presumably, the investment interest is valued at \$1,000 or more. We assume that Councilmember Mello's firm also is a source of \$250 or more in income to him. Finally, any client of his firm who pays to the firm a total of \$250 or more in a 12-month period is a source of income of \$250 or more to Councilmember Mello. (Section 82030(a).) Accordingly, Councilmember Mello is required to disqualify himself from participating in any city decision which would foreseeably and materially affect either his firm or a client who is a source of income of \$250 or more, in a manner that is different from the effect on the public generally.

You have asked us to assume that Councilmember Mello's consulting firm will be doing business with public agencies such as the Fremont Unified School District.^{3/} For ease of understanding, we will use the possibility of a contract with the school district as an example throughout this letter. You stated in your letter that a matter directly affecting the school district probably will be before the council from time

^{3/} Government Code Section 1090 prohibits government officials from having an interest in contracts with their agencies. Section 1090 is not part of the Act, and the Commission has no jurisdiction to provide advice concerning that statute. However, Councilmember Mello should be aware that Section 1090 may limit his ability to contract with city agencies. We refer you to the Attorney General for advice concerning Section 1090.

Allen E. Sprague
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to time. You have asked us to apply the conflict-of-interest provisions of the Act to this situation.

In the situation you pose, the school district would be a source of income to Councilmember Mello if it contracts with his firm for \$250 or more in consulting services. (Sections 82030 and 87103(c).) If the city council is faced with a decision where the school district is the applicant or a named party, Councilmember Mello would be required to disqualify himself unless the school district would be affected in substantially the same manner as the public generally. (Regulation 18702.1(a)(1) and (c)(1), copy enclosed.)

In a recent advice letter to your office (Lopus Advice Letter, No. A-88-044), we advised you that a decision which affects the Fremont Unified School District affects the public generally or a significant segment thereof, since the boundaries of the city and the school district are coterminous. Accordingly, even though there would be a material financial effect on the Fremont Unified School District when the city council considers the district's application for rezoning of real property, the "public generally" exception permits a councilmember who has received \$250 or more in income from the school district to participate in the rezoning decision.

Our previous advice applies equally to the situation you have presented concerning Councilmember Mello. If the school district is a source of \$250 or more in income to him, he may vote on matters where the school district is an applicant since the effect on the school district is the same as on the public generally. However, Councilmember Mello also must consider the effect of the decision on his engineering consulting firm. If the decision also would have a material financial effect on his firm, Councilmember Mello must disqualify himself from participating in the decision.

For example, Councilmember Mello's engineering consulting firm would be materially affected by the decision to rezone the school district's property if Councilmember Mello had prepared the school district's rezoning application. (Regulation 18702(c)(3)(B), copy enclosed.) In this situation, Councilmember Mello is prohibited from accomplishing as a city councilmember the job which the school district has hired his consulting firm to perform. Councilmember Mello also would be disqualified from participating in the city council's decision if the income he would receive from the school district would increase or decrease by \$250 or more depending on the outcome

Allen E. Sprague
June 30, 1988
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of the decision (i.e., a contingency fee arrangement).
(Regulation 18702.1(a)(4), copy enclosed.)

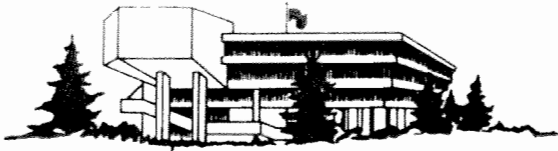
If you have any further questions regarding this matter,
please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan
By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosure



MAY 23 6 52 AM '88

City of Fremont

City Attorney's Office
39700 Civic Center Drive
P.O. Box 5006
Fremont, California 94537
(415) 790-6620

May 19, 1988

California Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804-0807

Re: City of Fremont/Councilman Gary J. Mello Request for
Advice

Gentlemen: •

Councilman Gary J. Mello, a professional engineer, has left the employ of a private engineering firm and has started his own engineering consulting firm. He anticipates being retained on specific jobs by various public agencies, including the Fremont Unified School District (the boundaries of which are coterminous with the City). It can be anticipated that occasionally a matter will be before the City Council directly affecting the school district, such as a pending matter in which the district seeks to rezone surplus school property prior to selling the property. It is assumed here that such decisions will have a material financial effect on the school district.

Of course, if Mr. Mello has a direct financial interest in the decision before Council he would abstain (he intends to attempt to avoid consulting jobs on projects which may require Council approval).

The question relates to source of income. When those occasional matters from the school district (or other public agency) come to Council for decision, and that agency has been a source of income (\$250 or more) to Mr. Mello in the prior twelve months, will Mr. Mello have to abstain pursuant to Govt.Code § 87103(c)?

In you advice letter A-88-044, the facts involved Fremont planning commissioner Pauline McIvor who owns a retail hardware store and the school district is a source of income. The conclusion of the advice letter was that "even though the decision will have a material financial effect on the district, that effect will not be distinguishable from the effect on the public generally."

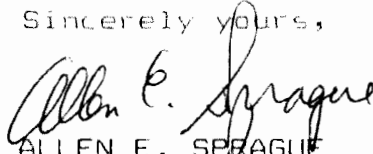


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Mr. Mello's professional business relationship to his client school district (or other public agency clients) may seem to some to be a closer than the relatively arm's length between a retail merchant and customer. Also, the relationship may well be an existing one, that is, Mr. Mello may be working on a school district job (not related to the matter before Council) and thus the school district isn't merely a prior source of income. Does the relationship between a consulting professional and his client affect the "public generally" analysis of your advice letter? It seems to me it doesn't, that the nature of the official's business relationship is not relevant; that the only relevant factor is whether the school district is the "public generally." Is this reasoning correct? I have spoken briefly about this with Kathryn Donovan of your staff.

Thank you for your consideration.

Sincerely yours,


ALLEN E. SPRAGUE
City Attorney

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cc: Councilman Gary J. Mello



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General Counsel

Kathryn E. Donovan
By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosure



California Fair Political Practices Commission

May 25, 1988

Allen E. Sprague
City Attorney
City of Fremont
39700 Civic Center Drive
P. O. Box 5006
Fremont, CA 94537

Re: 88-190

Dear Mr. Sprague:

Your letter requesting advice under the Political Reform Act was received on May 23, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:ld

cc: Councilman Gary J. Mello



MAY 23 6 52 AM '88

City of Fremont

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May 19, 1988

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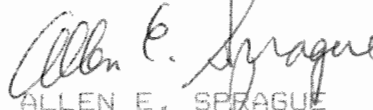


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ALLEN E. SPRAGUE
City Attorney

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cc: Councilman Gary J. Mello